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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 782

ARDELL LEE, individually, as Administratrix of the Estate of JAMES E. LEE, deceased, and as the Mother, Next Friend, Natural Guardian and Representative of REGINALD A. LEE, RONALD H. LEE and ARDELL LEE, infants; and BETTY MOORE, individually, as Administratrix of the Estate of RALPH E. WHITE, deceased, and as Mother, Next Friend, Natural Guardian and Representative of RALPH M. WHITE and JON E. WHITE, infants, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 30, 1968.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, *infra*, page 18, has not, as yet been reported. The opinion of the United States District Court for the Central District of California printed in Appendix B hereto, *infra*, page 31, is reported in 261 F. Supp. 252.

Jurisdiction

The judgment of the United States Court of Appeals was entered on August 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether the United States is liable under the Federal Tort Claims Act for the death of a serviceman caused by the negligence of an independent and unrelated non-military government agency, where (1) the Act is general in scope, (2) it has thirteen exceptions none of which encompasses this situation, and (3) the "incident to service" exception, articulated by this Court, evokes military relationship situations, which are not involved here.

Statute Involved

The statutory provisions involved are 28 U.S.C. §§ 1346 (b), 2674 and 2680, otherwise known as the Federal Tort Claims Act. They are printed in Appendix A, *infra*, pages 15, 16, 17.

Statement

The jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, *et seq.*, to recover wrongful death damages for the benefit of the widows and children of Marine Corps Sergeant James E. Lee and Corporal Ralph E. White.

On June 25, 1965, an aircraft operated by the Air Force Military Air Transport Service crashed shortly after take-off near Santa Ana, California and killed petitioners' decedents who were aboard as passengers.

This crash was caused by the negligence of the Federal Aviation Agency, a division of the government separate

and apart from either the United States Marine Corps in which the decedent was serving, or from the United States Air Force which was operating the aircraft. The F.A.A.'s civilian employees negligently instructed the plane to follow a departure procedure that prescribed inadequate clearance over the terrain near the airport. No claim has been made by the petitioners of negligence by the Marine Corps, the Air Force, any military service or the Department of Defense.

Petitioners' decedents were on active duty at the time of the crash. The government's motion to dismiss in the district court was based upon its conclusion that "active duty" is synonymous with "incident to service", as defined in *Feres* v. *United States*, 340 U. S. 135 (1950), and that where a serviceman's injury arises out of an activity "incident to service" he may not recover against the United States under the Federal Tort Claims Act.

Petitioners responded that the *Feres* exception to liability under the Act was limited to situations where a serviceman on active duty sustains injury by the negligence of others in military service with whom he had a military relationship, i.e., to situations where military discipline might be affected by permitting a claim. Since the F.A.A. was not a part of the military and the relationship to the decedents was the same as that between the F.A.A. and all passengers, the district court denied the government's motion.

The court below reversed the judgment of the district court, concluding that the *Feres* "incident to service" exception precluded petitioners' recovery.

Reasons for Granting Writ

The Court of Appeals for the Ninth Circuit, in reversing the district court and dismissing the complaint, incorrectly stated the law applicable to a serviceman's claim

under the Federal Tort Claims Act. It fell prey to the confusion that exists among the courts as to the import of three cases from this Court: *Brooks* v. *United States,* 337 U. S. 49 (1949); *Feres* v. *United States,* 340 U. S. 135 (1950), and *United States* v. *Brown,* 348 U. S. 110 (1954).

The Federal Tort Claims Act permits actions against the United States for the negligence of Government employees. 28 U.S.C. Sect. 1346(b) and 2674. Its language articulates a general rule of liability which makes no distinction with regard to the status of the claimant, whether it be civilian or military. The Act does not contain an "incident to service" or similar exception. It does, however, provide for 13 exceptions to liability in specified circumstances, 28 U.S.C. Sect. 2680,[1] none of which apply to the facts in the instant case.

The first case under the Federal Tort Claims Act to reach the United States Supreme Court was *Brooks* v. *United States, supra.* It arose from death and personal injuries to two Army servicemen on furlough who were involved in a collision with an Army truck, negligently driven by a civilian employee of the Army. This Court, holding the government liable, concluded that the "any claim" clause of the Federal Tort Claims Act meant all claims founded on negligence brought against the United States including those claims brought by servicemen. 337 U. S. at 51.

A judicial exception to the Act, applicable to some claims brought by servicemen, was expounded by this Court in *Feres* v. *United States, supra.* It decided three cases, *Feres, Jefferson* and *Griggs,* each of which concerned a claimant, who, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces. This Court, in denying liability, promulgated the rule that a serviceman cannot recover under

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[1] 28 U.S.C. § 2680 is printed in Appendix A, *infra,* page 15.

the Act if his injury arose from an activity "incident to service." However, neither in *Brooks,* where the phrase was first used, nor in *Feres,* did the Court explain the meaning of "incident to service."

United States v. *Brown, supra,* involved a discharged veteran who was negligently treated in a Veterans Administration hospital for a service-incurred injury. In upholding his claim, this Court analyzed *Feres:*

> "The Feres decision involved three cases, in each of which the injury, for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough; and the negligence alleged in each case was on the part of other members of the Armed Forces. . . . The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character." 348 U. S. at 111-112.

Brooks, Feres and *Brown* have, unfortunately, inspired many confused and inconsistent decisions. The term "incident to service" has been given lower court definitions, which are contradictory and even unrelated. Several courts have invited this Court to examine and unravel the legal labyrinth surrounding this rule.[2]

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[2] In *Callaway* v. *United States,* 289 F. 2d 171 (9th Cir. 1961), the court when faced with a claim arising from the death of a serviceman who was operating his own automobile on the way to a military base to receive training stated: "True the facts here are of an isolated nature and could be said to be not within the contemplation of the Supreme Court in deciding the *Feres* case. If such be true it is not for this court to make the distinction." *Id.* at 173.

(*Footnote continued on following page*)

Judge Gray in the district court opinion below, 261 F. Supp. 252 (C. D. Cal. 1966), pointed up one reason for the confusion when, after analyzing *Feres*, he concluded:

> "Justice Jackson wrote the opinion of the Court. He noted at the outset that the three cases had in common the fact that '. . . each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces. . . .'
>
> It is to be noted that the first of these quoted circumstances distinguishes the *Feres* case from *Brooks*, and the second distinguishes *Feres* from the case at hand. However, throughout the balance of his opinion, Jus-

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(*Footnote continued from previous page*)

In *Gursley* v. *United States*, 232 F. Supp. 614 (D. Colo. 1964), the court, in analyses of other courts' constructions of *Brown* and *Feres* concluded:

> "Although the principles of these two cases are thought to be compatible, their application to diverse fact situations is not free of difficulty—and the numerous decisions following one or the other of these leading cases fail to alleviate the confusion." *Id.* at 615.

In *Knecht* v. *United States*, 144 F. Supp. 786 (E. D. Pa. 1956), the court stated:

> "Since the *Brooks* and *Feres* decisions a number of conflicting lower court decisions have appeared: See *Brown* v. *United States*, D. C. 1951, 99 F. Supp. 685; *Herring* v. *United States*, D. C. 1951, 98 F. Supp. 69; *Barnes* v. *United States*, D. C. 1952, 103 F. Supp. 51; *Pettis* v. *United States*, D. C. 1952, 108 F. Supp. 500; *Snyder* v. *United States*, D. C. 1953, 118 F. Supp. 585; *Zoula* v. *United States*, 5 Cir., 1954, 217 F. 2d 81 and *Ritzman* v. *Trent*, D. C. E.D.N.C. 1954, 125 F. Supp. 664." *Id.* at 789.

In *Van Sickel* v. *United States*, 285 F. 2d 87 (9th Cir. 1960), the court, when faced with a contention that the *Feres* doctrine did not apply, and that the state's wrongful death statute gave the serviceman's representatives a right of action inependent of that possessed by the serviceman before death, stated that if *Feres* was:

> ". . . to be restricted so as to permit recovery in cases of the type of the instant case, such restriction should be made by the Supreme Court and not by this court." *Id.* at 91.

tice Jackson *ignored the latter aspect of the factual proposition that he had expressed*, and he considered the only question to be whether the Tort Claims Act extends its remedy to any serviceman who receives injury incident to his military service. He answered this question in the negative, and we now consider the reasons given for such conclusion and how they have survived subsequent examination by the Supreme Court." *Id.* at 254-55. (Emphasis added.)

As indicated by Judge Gray, *Feres* involved a narrow factual question, but its language was broad. Thus, the "incident to service" rule evolved without any clear guideline as to its application. Courts, in endeavoring to pinpoint precisely what is meant by "incident to service" have held the determinative factor to be among the following: whether the serviceman was on pass, furlough or leave, *Snyder* v. *United States*, 118 F. Supp. 585 (D. Md. 1953), *Barnes* v. *United States*, 103 F. Supp. 51 (W. D. Ky. 1952), *Brown* v. *United States*, 99 F. Supp. 685 (S. D. W. Va. 1951); whether the serviceman was performing duties of such a character as to undermine military discipline, *Downes* v. *United States*, 249 F. Supp. 626 (E.D.N.C. 1965); the exact location of the serviceman at the time of the injury, *Orken* v. *United States*, 239 F. 2d 850 (6th Cir. 1956), *Sapp* v. *United States*, 153 F. Supp. 496 (W. D. La. 1957), *Gursley* v. *United States*, 232 F. Supp. 614 (D. Colo. 1964); whether the serviceman was acting in the line of duty, *Archer* v. *United States*, 217 F. 2d 548 (9th Cir. 1954), *cert. denied*, 348 U. S. 953 (1955), *O'Brien* v. *United States*, 192 F. 2d 948 (8th Cir. 1951); and what was the military involvement of the plaintiff, *Layne* v. *United States*, 190 F. Supp. 532 (S. D. Ind. 1960), aff'd, 295 F. 2d 433 (7th Cir. 1961), *cert. denied*, 368 U. S. 990 (1962), *Herring* v. *United States*, 98 F. Supp. 69 (D. Colo. 1951).

Other courts have analyzed the facts without precise definition under a general discussion of "incident to serv-

ice", *Hand* v. *United States*, 260 F. Supp. 38 (M.D. Ga. 1966); *Rich* v. *United States*, 144 F. Supp. 791 (E.D. Pa. 1956). In *Rich* the court stated:

> "Although there have been conflicting decisions, it seems to me that the determinative fact in each case is not where the plaintiff was at the time he was injured (whether on or off the military reservation) and not whether he was at the time on pass, furlough, or 'leave' (although these things may have a bearing on the ultimate question), but whether what he was doing at the time was, in the language of the *Feres* case, 'in the course of activity incident to service.'" *Id.* at 792.

Inasmuch as there is no consistency as to which of these determinative factors would warrant application of the "incident to service" exception, the serviceman's chance of success in maintaining a suit under the Federal Tort Claims Act may depend upon the forum wherein such suit is initiated. For example, in *Brown* v. *United States*, 99 F. Supp. 685 (S.D. W. Va. 1951), a sailor had drowned in a base swimming pool by reason of the negligence of agents of the United States. The court, in permitting such suit to be maintained under the Tort Claims Act, concluded that the "incident to service" exception was inapplicable in that at "the time of this unfortunate accident, the deceased was on leave or liberty and was not under a military duty." *Id.* at 687. But, in *Chambers* v. *United States*, 357 F. 2d 224 (8th Cir. 1966), the court, in a similar fact situation, held the determining factor to be:

> ". . . that Chambers [deceased serviceman] was assigned to duty at the Whiteman Base, subject to the control of his military superiors. Even though he might have had a furlough order in his pocket or might have been engaged in swimming for recreation, his claim would be subject to the *Feres* rule and no recovery permitted. As a matter of fact, Airman Cham-

> bers' use of the pool, which was part of the base, was related to and depended upon his military service; otherwise, he would not have been privileged to use it." *Id.* at 229.

Thus, while the fact situations in *Chambers* and *Brown* are strikingly similar, because a different determinative factor was applied by each court, opposite decisions resulted.

In *Archer* v. *United States*, 217 F. 2d 548 (9th Cir. 1954), wherein an Army cadet on leave was killed in a crash of an Army plane, the determinative factor relied on by the court in denying recovery was not whether or not the cadet was on leave, but that he was under the military discipline of Army officers acting in the line of duty.

In *Callaway* v. *Garber*, 289 F. 2d 171 (9th Cir. 1961), *cert. denied*, 368 U. S. 874 (1961), the decedent was killed when, while driving to another base to receive training, his car collided with an automobile driven by another serviceman. The court denied the claim, holding that the activity was "incident to service" in that, without travel to the new base, the decedent would not have been able to respond to his superior officers. The court so held despite the fact that no particular method of travel had been specified by the Army, and, therefore, Callaway was not under direct compulsion of military discipline. In *Knecht* v. *United States*, 144 F. Supp. 786 (E.D. Pa. 1956), *aff'd*, 242 F. 2d 929 (3rd Cir. 1957), decedent was on pass returning to his military base when he became involved in a fatal collision with a truck-trailer owned and operated by the federal government. The court, taking a position wholly different from that in *Callaway*, held that the plaintiff was entitled to maintain a suit under the Federal Tort Claims Act. It concluded:

> "Any justification for holding that this activity was 'in the course of activity incident to service' merely

> because 'activity incident to service' was to follow at 8 A.M. would necessarily be based only upon the fallacy 'post hoc, ergo propter hoc'." *Id.* at 789.

In addition to the courts utilizing varying determinative factors to support their decisions when applying the "incident to service" exception, there exists a judicial contradiction as to whether these principal cases are consistent, inconsistent or exceptions to one another. In *Knecht* v. *United States*, *supra*, the court when analyzing other decisions with respect to *Brooks* and *Feres*, stated:

> "It is clear from a reading of the . . . cases that while all use the Brooks and Feres decisions as the bases for the results reached, the different courts stress varying phases of the two cases. . . . Some cases attempt to analyze the relationship of the Brooks and Feres cases and to determine to what extent Feres may have overruled Brooks. I consider the Brooks and Feres cases to be entirely consistent; in fact, they complement each other, for only when read together does the ruling of the Supreme Court on this point become clear." *Id.* at 789.

In contrast to the court in *Knecht*, the United States Court of Appeals for the Fifth Circuit, in *Zouda* v. *United States*, 217 F. 2d 81 (5th Cir. 1954), concluded that *Brooks* should be confined to its precise facts while *Feres* was the overriding law with regard to a serviceman's claim under the Federal Tort Claims Act.

In *Fas* v. *United States*, 191 F. Supp. 367 (E.D.N.Y. 1961), the court, faced with a wrongful death action for the death of a serviceman killed in a crash of a military aircraft, concluded:

> "The case at bar is distinguishable from Brooks v. United States . . . and United States v. Brown . . . *and does not come within the exceptions stated therein.*" *Id.* at 369. (Emphasis added.)

The need for this Court to place in proper perspective the serviceman's rights under the Federal Tort Claims Act becomes obvious after reading the opinion of the court of appeals, below. The court denied the claim and invoked the "incident to service" exception, notwithstanding the fact that the alleged tortfeasor was the Federal Aviation Administration, a division of the government separate and apart from either the United States Marine Corps, in which the decedent was serving, or from the United States Air Force, which was operating the aircraft.

The court concluded that this Court has never indicated that *Feres* should be limited to situations which pose a threat to or interference with military discipline. This conclusion clearly conflicts with decisions of this Court, particularly *United States* v. *Brown*, 348 U. S. 110 (1954).

Petitioners submit that the crucial determinative factor, and, indeed, the only one logically defensible under the terms of the Federal Tort Claims Act itself, is the existence of a military discipline relationship between the tortfeasor and the accident victim.

Since the Act contemplates government liability only when there is comparable private liability (28 U.S.C. 1346(b), 28 U.S.C. 2674) and since there is no private relationship comparable to that between solidier and superior[3] this Court, in *Brooks*, *Feres* and *Brown*, construed the Act inapplicable to torts arising out of a military relationship but applicable to other claims of servicemen against the United States.

That this is the significance of *Brooks*, *Feres* and *Brown* was made clear by Mr. Chief Justice Warren in this Court's unanimous opinion in *United States* v. *Muniz*, 374 U. S. 150

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[3] The discussion by the court of appeals, below, of the availability to servicemen of a compensation remedy completely ignores the fact that compensation was available and paid in both *Brooks* and *Brown*, which nevertheless permitted recovery under the Federal Tort Claims Act.

(1963). An inmate of a Federal prison was injured as a result of the negligence of prison guards and officials. In upholding the imposition of liability on the government, *Feres* was discussed at length and then characterized:

> "In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline and . . . orders given or . . . acts committed in the course of military duty, *United States* v. *Brown*.'" *Id.* at 162.

Thus, both *Brown* and *Muniz* recognized that the *Feres'* holding was confined to servicemen injured by servicemen. Furthermore, they limited the scope of *Feres* to situations embraced by the reasons for the exception, the existence of a military relationship and the possible impairment of military discipline that could result from permitting suits against the government where a military relationship was involved.

Judge Gray, in the district court opinion, below, adopted this reasoning in permitting the instant claim to be maintained. After analyzing *Muniz,* he concluded:

> "Thus, we have an explanation of *Feres* that provides the only authoritative and satisfactory basis for the decision that I have been able to find. It would follow therefrom that the exclusion of military personnel from recourse to the Act would not depend upon whether they were on active duty or on leave at the time of their injuries. Instead, it would depend upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. That relationship did exist in *Feres,* and recovery was not allowed." 261 F. Supp. at 256.

Additionally, the district court, below, based its decision on the terms of the statute itself. The court pointed out that there was no indication in the Federal Tort Claims Act that servicemen were to be deprived of its benefits. The court stated:

> "On the contrary, the fact that section 2680 specifically excludes 'any claim arising out of the combatant activities of the military or naval forces . . . during time of war' and 'Any claim arising in a foreign country,' would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities." *Id.* at 254.

In the instant case, there was no direct relationship, military or otherwise, between the decedents and the negligent F.A.A. employees. The F.A.A. employees were civilians. There is no claim here that the military crew of the aircraft was negligent. Thus, factors of military discipline are not involved.

To permit the decedents' claims would not constitute judicial review of military orders or activities. Rather, the relationship was identical to that between the Federal Aviation Agency and passengers aboard all aircraft; therefore, the same Federal Tort Claims Act liability should obtain. It is clear, therefore, that the decision of the court of appeals, below, is contrary to the express terms of the statute, and contrary to the decisions of this Court in *Brooks* and *Feres,* as amplified and explained in *Brown* and *Muniz.*

Conclusion

The court of appeals, below, has misunderstood and misapplied the decisions of this Court in *Brooks, Feres,* and *Brown.* Without any support in the language of the

statute, and contrary to this Court's explanation, in *Muniz*, the court below has denied to all servicemen on active duty availability of the Federal Tort Claims Act, even where, as here, the tort was committed by an unrelated federal agency.

Decisions of other federal courts, on the availability of the Act to servicemen, are inconsistent and confused.

This Court should grant this petition for a writ of certiorari and summarily reverse the holding of the court of appeals, below.

To avoid confusion and inconsistency among the courts, this Court should reaffirm *Brooks*, *Brown*, and *Muniz*, making it clear that the Federal Tort Claims Act is a statute of general applicability; that the United States is liable where there is comparable private liability; and that servicemen on active duty may recover under the Act except where the tort has been committed by other servicemen on active duty, under circumstances where there is no comparable private liability because a military relationship exists.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statute Involved

28 U.S.C. 1346(b):

> "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

* * * * *

28 U.S.C. 2674 provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

* * * * *

28 U.S.C. 2680:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to

exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. ARDELL, LEE, etc., et al., *Appellees.*	No. 21,706

[August 30, 1968]

Appeal from the United States District Court
For the Central District of California

(Formerly United States District Court
Southern District of California
Central Division)

Before: HAMLEY and CARTER, Circuit Judges, and SMITH, District Judge.*

CARTER, Circuit Judge:

This is a Tort Claim case, where the personal representatives and dependents of two service men brought suit against the government, due to the death of the service men in a crash of a military aircraft. The government moved to dismiss the complaint on the basis of *Feres* v. *United States,* 340 U. S. 135 (1950). The motion was denied; the trial court filed an opinion, *Ardell Lee, etc., et al.*

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* Hon. Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

v. *United States,* 261 F. S. 252. (Cen. Dist. of Calif. 1966). The district court denied a timely motion for reconsideration, but certified that its denial involved a controlling question of law, and that an immediate appeal would materially advance the termination of the litigation. On March 23, 1967, this court, pursuant to 28 U.S.C. § 1292(b) and this court's Rule 38, granted the government's application for leave to take an interlocutory appeal.

The Question Presented

The sole question presented is whether *Feres* v. *United States,* supra, and its ultimate holding that servicemen on active duty, are not within the Act, is still good law, requiring the dismissal of the action for lack of jurisdiction and failure to state a claim, or whether, as the district court held, that decision has been so eroded by subsequent decisions of the Supreme Court, that it is no longer the controlling law.

The Complaint

The complaint is in two causes, one for each of the service men whose deaths are involved, and the same allegations hereafter referred to are common to each cause of action. The first cause alleges that on June 25, 1965, Sgt. James E. Lee, deceased, was on active duty in the Marine Corps; that he was a passenger aboard a transport being operated by Military Air Transport Service, United States Air Force; that the aircraft crashed in the vicinity of Santa Ana, California; that the United States, through its Federal Aviation Agency, a division of the government, separate and apart from either the United States Marine Corps in which the decedent was serving, or from the United States Air Force which was operating the aircraft, owned, operated and controlled certain radar and electronic

and radio facilities used by the United States to control, advise, direct and inform aircraft operating from the Marine Corps Air Station at El Toro, Santa Ana, California,[1] that the United States, through its Federal Aviation Agency developed and approved Standard Instrument Departures (S.I.Ds.) and other navigational data which were used by aircraft departing the Marine Corps station; that prior to and at the time of the crash, the aircraft of the United States Air Force, in which Lee was a passenger, was departing the Marine Corps station at El Toro, Santa Ana, California, while receiving control, advice and direction from the defendant United States of America's Federal Aviation Agency employees acting in the scope of their employment, "and in accordance with the Standard Instrument Departure and other navagational data which had been prepared and approved by the defendant's Federal Aviation Agencies employees . . .; that the crash was caused by the negligence of defendant United States of America's Federal Aviation Agency in carelessly operating, maintaining and controlling the departure of the said aircraft from the Marine Corps Air Station . . . and in carelessly controlling, advising, directing and informing the aircraft of dangerous terrain in the vicinity of the airport, in providing a departure procedure which incorporated inadequate terrain clearance information, and in other aspects." Other allegations as to jurisdiction, death, the capacity of plaintiffs, and damages have been omitted.

The Motion to Dismiss

The government's motion to dismiss, under Rule 12(b) F.R.C.P., asserted lack of jurisdiction over the subject

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[1] The complaint does not indicate whether the plane crashed to earth *on or off* the base, stating only "said aircraft crashed in vicinity of Santa Ana, California."

matter of the action, and that the complaint failed to state a claim upon which relief could be granted. The motion was supported by a memorandum based on *Feres* v. *United States*, supra, and subsequent circuit court cases following its holding.

The Posture of the Case

At the argument on the appeal, government counsel would not concede that the case presented the issue of the United States as a defendant, solely because of the activities of a civilian agency, the Federal Aviation Agency. Because of the nature of the complaint, the government was not in a position to put the case in this posture. At argument the government called attention to the fact the crash was that of a military transport operated by the Air Force personnel on the Marine Corps base, or after taking off from a Marine Corps base, and that the employees of the Federal Aviation Agency were undoubtedly stationed on the base; that the proof would probably show that the Marine Commandant of the base was in overall charge of all activities, civilian or otherwise, on the Marine Corps base.

The Supreme Court Decisions

The problem of claims of dependents of servicemen under the Tort Claims Act, has been before the Supreme Court on three occasions. In *Brooks* v. *United States*, 337 U. S. 49 (1949) the court considered claims arising from death and personal injury sustained by two servicemen on *furlough* resulting from the collision of the vehicle in which they were riding with an Army truck. Recovery was allowed.

Feres v. *United States*, supra, involved three cases. In one a soldier (Feres), on *duty* quartered in unsafe bar-

racks with a defective heating plant, died in a fire. In the second a soldier (Jefferson), on *duty* underwent an abdominal operation. Eight months later, during a subsequent operation after his discharge from the service, a towel was discovered and removed from his stomach. It was found to have been left through negligence by an army surgeon. In the third case, a soldier (Griggs), while on *duty*, met death because of negligence and unskillful treatment by army surgeons. In each case it was held no recovery could be had on the claims.

United States v. *Brown*, 348 U. S. 110, was decided by the court in 1954. There a veteran, *after discharge* from the service, was negligently treated in a Veterans Administration hospital for an injury occurring while in service. The Supreme Court upheld the claim under the Tort Claims Act.

Congress has not Amended the Act

Congress has not seen fit to amend the Tort Claims Act. In *Feres*, the Supreme Court said: "If we misinterpret the Act . . . Congress possesses a ready remedy." (340 U. S. at 138). Despite this statement in 1950, Congress has acquiesced in the holding of *Feres*, permitting the decision to remain undisturbed for eighteen years. The Supreme Court has twice stated:

> " '[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.' *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, 774-775." *Paterson* v. *United States*, 359 U. S. 495, 496 (1958).

This circuit in *Preferred Insurance Co.* v. *United States*, 222 F. 2d 942; cert. denied 350 U. S. 837 (1955), stated at

page 945, concerning the *Feres* case:

> "The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to the Congressional intent in the adoption of the Act."

The Circuit Decisions

The circuit courts have consistently followed the rule stated in *Feres* "that the government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of, or are in the course of activity incident to service." (340 U. S. at 146). The rule has been applied both when the tortious act was committed by service personnel and when it was committed by civilian personnel of the government.

(a) *Case where the tortious act was committed by service personnel: Preferred Ins. Co.* v. *United States,* 227 F. 2d 942 (9 Cir. 1955); cert. denied 350 U. S. 837. (Air Force plane crashes into trailers of enlisted men on base). *Archer* v. *United States,* 217 F. 2d 548 (9 Cir. 1954). (Military academy cadet killed in crash of air force plane while on leave). *Van Sickel* v. *United States,* 285 F. 2d 87 (9 Cir. 1960). (Death of serviceman in government hospital). *Callaway* v. *Garber,* 289 F. 2d 171 (9 Cir. 1961). (Air Force sergeant killed in collision with car driven by Navy officer on government business). *Knoch* v. *United States,* 316 F. 2d 532 (9 Cir. 1963). (Action by sailor for malpractice of Navy doctor). *Bailey* v. *De Quevedo,* 375 F. 2d 72 (3 Cir. 1967). (Enlisted man's action for malpractice in Army hospital). *Buckingham* v. *United States,* —— F. 2d —— (4 Cir. 4/29/68). (Air Force service man died because of alleged negligence of doctor and attend-

ants at Air Force hospital). *Zoula* v. *United States,* 217 F. 2d 81 (5 Cir. 1954). (Students on tour of military duty struck by army ambulance on military base). *Orken* v. *United States,* 239 F. 2d 850 (6 Cir. 1956). (Air Force officer killed when government plane crashed into his house). *O'Brien* v. *United States,* 192 F. 2d 948 (8 Cir. 1951). (Member of Organized Navy Reserve killed by alleged negligence of navy pilot). *United States* v. *Carroll,* 369 F. 2d 618 (8 Cir. 1966). (Reservist in uniform, en route to reserve drill, killed in crash of Navy plane). *Chambers* v. *United States,* 357 F. 2d 224 (8 Cir. 1966). (Airman killed in pool on Air Force base).

(b) *Cases where at least one tortfeasor not connected with the Military. Layne* v. *United States,* 295 F. 2d 433 (7 Cir. 1961); cert. denied 368 U. S. 990. (Major in national guard on training flight fatally injured through alleged negligence of U. S. civilian employee at United States airfield). *Sheppard* v. *United States,* 369 F. 2d 272 (3 Cir. 1966); cert. denied 386 U. S. 982. (Death of three Marines growing out of same crash involved in instant case. Though not shown in the per curiam, the complaint alleged negligence "of members of the United States Air Force *and others,*" a reference to the F.A.A. employees). *United Air Lines Inc.* v. *Wiener,* 335 F. 2d 379, 396-398, 402, 404 (9 Cir. 1964); cert. denied 379 U. S. 951). (Government not liable for injuries to servicemen arising out of activities incident to service even though government's liability predicated in part, upon negligence of employees of C.A.A.).

Status of Plaintiff v. *Status of Tortfeasor*

The Supreme Court and Circuit cases are consistent in holding that the status of the deceased or injured person controls. If his injury or death was connected with the

military, the claimant may not recover under the Tort Claims Act.

The court below has substituted the *status* of the tortfeasor as a basis for its decision. The complaint alleged that the negligence was that of civilian employees of the government. To so hold, the court has turned its back on all the Supreme Court cases.

In the ordinary Tort Claim case, where a person with a civilian status is injured or dies, the claimant has his rights under the Tort Claims Act, regardless of the civilian or military status of the individual tortfeasor. An agent of the government has committed the wrong and the government is held liable. There is no logical distinction between the status of the civilian or the military tortfeasor.

There is logic however, in the Supreme Court and Circuit cases, holding that the status of the person whose injury or death gives rise to the claim, is the status that controls.

The Rationale of Other Available Compensation

The Supreme Court in the *Feres* case, recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character" and that the application of local law to that relationship by virtue of the Tort Claims Act would be completely inappropriate. (340 U. S. at 143, 144). It also stressed the fact that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole," (340 U. S. at 139), and that it was thus highly relevant that Congress had already provided "systems of simple, certain and uniform compensation for injuries or death of those in the armed services." (340 U. S. at 144).

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The concept of "service—incident injury" set forth in the *Feres* decision was not wholly novel, but instead was one with ready context within the frame work of Workmen's Compensation statutes. (340 U. S. 143, 146). It is clear that the court contemplated its definition of the phrase "incident to service" in terms of the Workmen's Compensation concept of "course of employment." See *United States* v. *Forfari*, 268 F. 2d 29, 33-34 (9 Cir. 1959); cert. denied 361 U. S. 902. The concept of the "course of employment" in Workmen's Compensation is not limited to injury inflicted by fellow employees or otherwise dependent upon the status of the tortfeasor. For example, *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 506-507.

The rationale in *Feres* of the effect of "systems of simple, certain and uniform compensation for injuries or death of those in the armed services," (340 U. S. at 144) is still a good one. The Supreme Court has made consistent application of this rationale in analogous situations, holding that where Congress has provided a form of administrative compensation for government employees injured in the performance of their duties, the availability of such a remedy precludes recourse to a tort suit against the government.

In *Johansen* v. *United States*, 343 U. S. 427 (1952) a civilian employee of the United States who was a member of a crew of a public vessel (not a merchant vessel), was not permitted relief under the Public Vessels Act, 43 Stat. 1112 et seq., 46 U.S.C. § 781 et seq., because his remedies under the Federal Employees Compensation Act, 39 Stat. 742 et seq., 5 U.S.C. § 751 et seq., were held to be exclusive. The Court found it had a duty "to attempt to fit the Public Vessels Act, as intelligently as possible, 'into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole.'" Quoting and citing *Feres*.

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In *Patterson* v. *United States*, 359 U. S. 495 (1959) the court rested its decision on *Johansen*, supra, and held certain employees of the United States, who were entitled to benefits under the Federal Employees Compensation Act, supra, did not have a right against the government under the suits in Admiralty Act, 41 Stat. 525 et seq., 46 U.S.C. § 741 et seq., as seamen on government vessels in merchant service.

United States v. *Demko*, 385 U. S. 149 (1966) and *United States* v. *Muniz*, 374 U. S. 150, fit precisely into the compensation rationale. In *Demko* the prisoner had a right to and had received an award for compensation under 18 U.S.C. § 4126, applying to Federal Prison Industries Inc. The case denied him the right to seek a remedy under the Tort Claims Act. In *Muniz*, as explained in *Demko* (page 153) ". . . the two prisoners there involved, who were not protected by the prison compensation law, were not barred from seeking relief under the Federal Tort Claims Act." In *Muniz* the court noted it found "no occasion to question the holding in *Feres*." (374 U. S. at 159).

Appellee argues that there is no exclusive remedy by statute granting benefits to the widow and children of the decedents.[2] However, the case law above cited has shown that the Supreme Court, in the absence of a statutory provision that the compensation remedy be exclusive, has held that where there exists a form of administrative compensation for government employees injured in the performance of their duties, the availability of such remedy precludes government liability on some other ground. In *Johansen* v. *United States*, supra, the court noted that . . . "Congress did not specifically declare that the Compensation Act was exclusive of all other remedies." (343 U. S. at

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[2] For non-exclusive remedies of the dependents of a serviceman, see the case note in 45 No. Carolina Law Review 1129, at 1138-39 (1967).

433). The same Compensation Act was involved in *Patterson* v. *United States*, supra. In *Demko*, supra, the compensation under 18 U.S.C. § 4126 was not made the exclusive remedy by statute. The court found it to be.

The Rationale of Discipline

It is true that in *United States* v. *Brown*, supra, the court stated:

> "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in *Feres*] to read that Act as excluding claims of that character." (348 U. S. at 112).

And in *United States* v. *Muniz*, 374 U. S. 150, 162 (1963), the court said:

> "In the last analysis, *Feres* seems best explained by" the above explanation from *Brown*.

But the statement in *Brown* is not an alteration of *Feres*. It is rather simply an explanation of *Brooks* and *Brown*. It sets forth reasons why servicemen injured outside the "course of military duty" are exempt from the general rule that where compensation has been provided, Tort Claim suits may not be maintained. Although the rule of non-liability for injuries to servicemen "incident to service" is designed to avoid interference with military discipline, the Supreme Court has never indicated that *Feres* should be limited to situations which pose a threat or interference with military discipline.

Appendix B.

In the case at hand, the threat of military discipline is far more direct than it was in *Feres*. In the three cases decided in *Feres*, one involved a sleeping soldier who died from alleged negligence in the maintenance of a defective heating plant, and the other two involved soldiers injured by alleged malpractice.

In the case at bar, although the employees of the F.A.A. were not members of the armed services, they were engaged in the performance of a service for the military in connection with the take-off of an Air Force plane from a military base. When the two Marines whose claims are here involved, boarded the military plane, they did so under the compulsion of military orders; they were at all times subject to the discipline of the military personnel in charge of the airplane, as well as the commands of their superiors aboard the aircraft. Thus, the considerations of discipline which in part underlie the *Feres* rule are strikingly present here.

On the other hand, compare the three cases decided in *Feres*. The necessity of maintaining discipline while a soldier is asleep or on an operating table is far less clear than the necessity for maintaining discipline among soldiers being transported for military service in military aircraft under control of military authorities.

The problem presented by the language in *Brown*, supra, concerning discipline, etc., has been met and decided by this circuit. In *Callaway* v. *Garber*, 289 F. 2d 171, 173-174 (9 Cir. 1961); cert. denied 368 U. S. 874, an Air Force officer was killed in a collision with another vehicle driven by a Navy officer. The case fell squarely within *Feres*, growing out of activities "incident to service" but did not seem to fit the explanation offered in *Brown*. This circuit decided the case in accordance with *Feres*, holding that the Tort Claims statute could not be maintained. The court stated:

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"The instant case can find no shelter within those reasons [in *Brown*], since the negligent and injured parties here were members of different branches of the service and were engaged in entirely different and unconnected activities at the time of the accident. However, the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case." (pages 173-174).

Conclusion

The district court conceded that *Feres* controlled unless its holding had been eroded away. Despite the Supreme Court holdings, the fact that Congress had not corrected the *Feres* ruling by amendment of the Tort Claims Act, and the line of circuit cases following *Feres*, including cases in this circuit, the district court decided *Feres* was no longer the law. This district court's views and judgment stand alone in conflict with the views of the Supreme Court, Congress and this and other circuits.[3]

In *Van Sickel* v. *United States*, 285 F. 2d 87 (1960) the contention was made that *Feres* did not apply, and that the state wrongful death statute gave the serviceman's representatives a right of action independent of that existing in the serviceman before death. This court ruled that if *Feres* was to "be restricted so as to permit recovery in cases of the type of the instant case, such restriction should be made by the Supreme Court and not by this court." (p. 91).

The judgment is reversed.

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[3] For other case notes concerning the decision in the district court below, see 18 Western Reserve Law Review 1788 (1967), 18 Syracuse Law Review 887 (1967).

Appendix B.

ARDELL LEE et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

Civ. No. 66—1052

United States District Court
C. D. California.

Dec. 15, 1966.

MEMORANDUM OF DECISION AND ORDER

WILLIAM P. GRAY, District Judge.

Two enlisted men of the United States Marine Corps, on active duty, were in process of being transferred to Viet Nam, and for that purpose they were placed on board an airplane operated by the Military Air Transport Service, United States Air Force. In the course of taking off from the El Toro Marine Corps Air Station, California, to begin the overseas flight, the airplane crashed, and the two servicemen, along with many other people, were killed. Their personal representatives bring this action under the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671 et seq. The complaint makes no charge against the Marine Corps or against MATS; it alleges, instead, that the crash was caused by the negligence of the Federal Aviation Agency in operating, maintaining and controlling the departure of the aircraft from the ground and in giving inadequate terrain clearance information.

The Government has moved to dismiss the action on the ground that, as a matter of law, the facts here concerned preclude recovery under the Tort Claims Act. The issue thus raised has been briefed by both sides, argued orally and submitted to the Court for decision.

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The position of the Government is well summarized by the following sentence from Justice Jackson's opinion in Feres v. United States, 340 U. S. 135, 146, 71 S. Ct. 153, 159, 95 L. Ed. 152 (1950):

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

If this is a correct statement of the law, the case at hand must be dismissed, because the deaths of the two servicemen clearly were in the course of activity incident to their service with the Marine Corps.

However, for reasons hereinafter set forth, it is my conclusion that the above quoted sentence is no longer authoritative, that under present law these plaintiffs are not precluded from seeking relief under the Federal Tort Claims Act, and that the motion to dismiss must therefore be denied.

The terms of the statute, itself, give no indication that servicemen injured under the circumstances here concerned are to be deprived of the benefits of the Act. On the contrary, the fact that section 2680 specifically excludes "Any claim arising out of the combatant activities of the military or naval forces * * * during time of war" and "Any claim arising in a foreign country," would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities. In this respect, the same conclusion was asserted by Justice Murphy, in speaking for the Court in Brooks v. United States, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200 (1949). He pointed out that the Tort Claims Act, with the exceptions therein specified, provides for District Court jurisdiction over any claim for personal injury or death founded upon negligence, and he expressed disbelief that "'any

claim' means 'any claim but that of servicemen' ". He also said that "It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." (Page 51, 69 S. Ct. page 919.)

In *Brooks*, two servicemen were riding in their automobile with their father along a public highway in North Carolina. They were doing so for their own purposes and presumably were on pass or furlough. One was injured and the other was killed when their car was struck by a United States Army truck. The Supreme Court held that the plaintiffs' action under the Tort Claims Act had been well founded.

In the course of his opinion in *Brooks*, Justice Murphy acknowledged that to adhere to the literal language of the statute and allow recovery to servicemen irrespective of how their injuries related to military service, might bring about outlandish results that Congress clearly would not have intended. "A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, * * *" occurred to the Court as examples in which the allowance of recovery would be incongruous. However, the opinion emphasized that the accident to the Brooks brothers had nothing to do with their military careers, and it asserted that the Court withheld comment as to a case involving an accident incident to such service.

Feres v. United States, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) was just such a case; actually there were three combined cases. In one, a soldier was quartered in barracks that should have been known to be unsafe because of a defective heating plant, and he died in the ensuing fire. The other two cases involved negligence by army surgeons in the course of medical operations upon servicemen. In each of the three instances recovery was sought under the Federal Tort Claims Act and the Supreme Court denied relief.

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Justice Jackson wrote the opinion of the Court. He noted at the outset that the three cases had in common the fact that "* * * each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." (Page 138, 71 S. Ct. page 155.)

It is to be noted that the first of these quoted circumstances distinguishes the *Feres* case from *Brooks*, and the second distinguishes *Feres* from the case at hand. However, throughout the balance of his opinion, Justice Jackson ignored the latter aspect of the factual proposition that he had expressed, and he considered the only question to be whether the Tort Claims Act extends its remedy to any serviceman who receives injury incident to his military service. He answered this question in the negative, and we now consider the reasons given for such conclusion and how they have survived subsequent examination by the Supreme Court.

1. The opinion in *Feres* reasoned that the primary purpose of the Tort Claims Act was to provide a remedy to those who had been without, as reflected in the large number of private bills that had stemmed from torts suffered at the hands of Government employees; that there had been no large number of private bills on behalf of military personnel, because they and their dependents had already been given a comprehensive system of relief; and that it therefore followed that Congress had not intended to benefit servicemen in the passage of the Tort Claims Act. Similarly, it was suggested that Congress presumably would not have intended to permit servicemen to have double recovery, and that therefore the failure of the Tort Claims Act to provide for adjustment between the relief therein granted and the military disability and death benefit system, indicated that the latter is to be the exclusive remedy.

This argument was specifically rejected four years later in United States v. Brown, 348 U. S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954). There, a veteran had received a service connected injury to his knee, for which he was receiving compensation. The need for a further operation arose, and in the course of performing such operation the doctor in the Veterans Administration hospital negligently caused serious further and permanent damage to the patient's leg. The Supreme Court held that recovery under the Tort Claims Act should be allowed. The opinion referred to the decision in Brooks as having concluded "* * * that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Torts Claims Act but only reduced the amount of any judgment under the latter Act." The next sentence stated: "We adhere to that result." (Page 113, 75 S. Ct. page 144.)

Likewise, in United States v. Muniz, 374 U. S. 150, 160, 83 S. Ct. 1850, 1856, 10 L. Ed. 2d 805 (1963), Chief Justice Warren, in speaking for the Court said that "* * * the presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence" under the Tort Claims Act. Cf., United States v. Demko, 87 S. Ct. 382 (U. S. Dec. 5, 1966).

2. Another argument that was persuasive in *Feres* was that the Tort Claims Act (in section 2674) provides that "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *." The opinion reasoned that since private individuals do not maintain military establishments and therefore are not subjected to claims even remotely analogous to those at issue, the statute precluded recovery for the latter claims.

This argument was specifically rejected in Indian Towing Co. v. United States, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), which allowed recovery for damages resulting from the grounding of a tug due to the negligence of the Coast Guard in the operation of a lighthouse. Justice Reed dissented on the ground that the majority decision had rejected the doctrine of the *Feres* case.

3. Justice Jackson, in *Feres,* also considered it significant that the Tort Claims Act "* * * makes '. . . the law of the place where the act or omission occurred' govern any consequent liability." (340 U. S. at 142, 71 S. Ct. at 157.) He then reasoned that it would not be rational to cause recovery by a serviceman to be governed by the laws of the place where the injuries occurred, inasmuch as he has no control over where his military duties might take him.

Inmates of federal penitentiaries, likewise, have a considerable lack of discretion with respect to the states in which they dwell. But this did not prevent the Court from holding that two such prisoners might recover under the Act for injuries that they sustained due to the negligence of supervisory personnel. United States v. Muniz, 374 U. S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963). In the course of his opinion for the Court, Chief Justice Warren adverted to the *Feres* reasoning that is summarized in the preceding paragraph. He thereupon rejected it, concluding with the comment that although the nonuniform right to recover because of varying state laws might possibly prejudice some prisoners, "* * * it nonetheless seems clear that no recovery would prejudice them even more." (Page 162, 82 S. Ct. at 1857.)

Although the opinion in *Muniz* expressly stated that the Court found no occasion to question *Feres,* so far as military claims were concerned, it proceeded to discredit or express lack of enthusiasm for each of the reasons upon

which the doctrine of that case was founded. Chief Justice Warren concluded his discussion of *Feres* as follows:

> "In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty * * *.' United States v. Brown, 348 U. S. 110, 112, 75 S. Ct. 141, 143 [99 L. Ed. 139]." (374 U. S. at 162, 83 S. Ct. at 1858.)

[1] Thus, we have an explanation of *Feres* that provides the only authoritative and satisfactory basis for the decision that I have been able to find. It would follow therefrom that the exclusion of military personnel from recourse to the Act would not depend upon whether they were on active duty or on leave at the time of their injuries. Instead, it would depend upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. That relationship did exist in *Feres,* and recovery was not allowed. The same was true in Archer v. United States, 217 F. 2d 548 (9th Cir. 1954), cert. denied 348 U. S. 953, 75 S. Ct. 441, 99 L. Ed. 745 (1955), in O'Brien v. United States, 192 F. 2d 948 (8th Cir. 1951), and in Van Sickel v. United States, 285 F. 2d 87 (9th Cir. 1960). Such relationship was not present in *Brooks* or in *Brown,* in which the claimants prevailed. Thus, all of the decided cases are in harmony with this test, with the following exception.

Callaway v. Garber, 289 F. 2d 171 (9th Cir. 1961) involved a situation in which three Air Force sergeants were under orders directing them to go from South Dakota to

Seattle, Washington to attend a special service school. They properly chose to make the trip together by private automobile, and while doing so their car was struck by another automobile driven by a recruiting officer of the United States Navy while on official business. One of the three sergeants was killed, and his next of kin brought suit under the Tort Claims Act. The Court of Appeals affirmed the denial of recovery. The opinion, by Judge Orr, set out the hereinabove quoted "explanation" of the *Feres* decision and very aptly observed that those reasons had no relevance to the case at hand, since the official activities of the negligent party and those of the injured parties were entirely unrelated. The opinion then concluded by stating:

> "However, the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case." (Page 174.)

It seems to me that the negation of the *Feres* rule, for which Judge Orr somewhat wistfully was looking, has been provided by the later *Muniz* decision.

[2, 3] In the present case the two servicemen were killed in the course of their official relationships with the Marine Corps and with MATS. But the Federal Aviation Agency, whose alleged conduct is the only target of this action, is not a part of the military. It is an administrative agency created by Congress and given the responsibility of establishing and operating air navigation facilities and procedures for efficient air safety and traffic control. 49 U.S.C. section 1341 et seq. Such responsibility extends to all airports, civil as well as military. As far as the FAA was concerned, the decedents simply were two passengers in an airplane, just as in *Brooks* the two claimants were in the same position as any other motorist on the highway.

Appendix B.

Applying the test that I have derived from the hereinabove quoted "explanation" of the *Feres* decision, it follows that recovery by the present plaintiffs under the Tort Claims Act may not be foreclosed to them if they can prove the negligence that they allege.

The defendant's motion to dismiss the action is denied, and the defendant is given twenty days within which to answer the complaint.